Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RUDY BALMORE ZAVALA VILLALOBOS, Defendant.	No. CR00-4013-MWB **ORDER REGARDING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

I. INTRODUCTION AND FACTUAL BACKGROUND

In a one-count information filed on September 8, 2000, defendant Rudy Balmore Zavala Villalobos was charged with conspiring to distribute methamphetamine within 1000 feet of a public park, in violation of 21 U.S.C. §§ 846 and 860. Defendant Villalobos entered a plea of guilty to the charge and he was sentenced to 240 months imprisonment, the mandatory minimum sentence. Defendant Villalobos did not appeal his conviction. Instead, defendant Villalobos filed his current motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. In his motion, Villalobos challenges the validity of his conviction and sentence on the following grounds: (1) the court employed the wrong standard in determining drug quantities at his sentencing; (2) that the indictment was fatally flawed because it failed to reference 21 U.S.C. § 841(b); and (3) that 21 U.S.C. § 846 is unconstitutional on its face.

II. LEGAL ANALYSIS

A. Standards Applicable To § 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

> [Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was 'imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.'

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not serve as a substitute for a direct appeal, rather "[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant's ability to raise that issue for the first time in a § 2255 motion. *Dejan v. United States*, 208 F.3d 682, 685 (8th Cir. 2000); *Swedzinski v. United States*, 160 F.3d 498, 500 (8th Cir. 1998); *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456

U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997) (per curiam). A defendant may surmount this procedural default only if the defendant "'can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.'" *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

B. Analysis Of Issues

None of the claims defendant Villalobos has presented in his § 2255 motion were raised on direct appeal. Defendant Villalobos alleges that the reason for his failure to appeal these issues was ineffective assistance of counsel. The ineffective assistance of counsel may constitute "cause and prejudice" excusing the procedural default of his failure to assert the claim on direct appeal. *See Tokar v. Bowersox*, 198 F.3d 1039, 1051 (8th Cir. 1998), *cert. denied sub nom. Tokar v. Luebbers*, 531 U.S. 886 (2000); *Boysiewick v. Schriro*, 179 F.3d 616, 619 (8th Cir. 1999). Moreover, claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings under 28 U.S.C. § 2255. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1105 (8th Cir. 1999) (reiterating that ineffective assistance of counsel claims are best presented in a motion for post-conviction relief under 28 U.S.C. § 2255); *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998) (noting ineffective assistance of counsel claims more properly raised in 28 U.S.C. § 2255 motion) (citing *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995) (stating ineffective assistance of counsel claims "more appropriately raised in collateral proceedings under 28 U.S.C. § 2255")); *United States v. Scott*, 26 F.3d 1458,

1467 (8th Cir. 1994) (declining to consider ineffective assistance of counsel claims raised for first time on direct appeal where claim not raised in a motion for postconviction relief pursuant to 28 U.S.C. § 2255).

Thus, the underlying merits of all of Villalobos's claims lie in whether Villalobos can demonstrate ineffective assistance of his counsel. Therefore, the court will address Villalobos's specific claims after briefly reviewing the standards for a claim of ineffective assistance of counsel.

1. Standard for ineffective assistance of counsel

In order to prove a claim of ineffective assistance of counsel, a convicted defendant must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." *Id.* at 687*; Furnish v. United States of America*, 252 F.3d 950, 951 (8th Cir. 2001) (stating that the two-prong test set forth in *Strickland* requires a showing that (1) counsel was constitutionally deficient in his or her performance and (2) the deficiency materially and adversely prejudiced the outcome of the case); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001) (same). Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Indeed, "counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). However, there is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy. *Strickland*, 466 U.S. at 689; *see Collins v. Dormire*, 240 F.3d 724, 727 (8th Cir. 2001) (in determining whether counsel's performance was deficient, the court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance . . .") (citing *Strickland*). With respect to the "strong presumption" afforded to counsel's performance, the Supreme Court specifically stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689 (citations omitted).

To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness."). The Supreme Court has stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack

of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

2. Specific claims

a. Drug calculation

Defendant Villalobos asserts that the court erred in requiring that the government prove the drug amounts involved here by the preponderance of the evidence. The Eighth Circuit Court of Appeals has recognized that sentence-enhancing facts may be found by the judge under a preponderance-of-the-evidence standard. *United States v. Franklin*, 250 F.3d 653, 664 (8th Cir. 2001); *United States v. Robinson*, 241 F.3d 115, 121 (1st Cir. 2001). Accordingly, the court did not error in determining the drug quantity involved here using a preponderance of the evidence standard. Thus, Villalobos cannot establish that he was prejudiced by his attorney's failure to raise this issue on appeal. Therefore, this part of defendant Villalobos's motion is **denied.**

b. Indictment flaw

Defendant Villalobos also asserts that the indictment was fatally flawed because it failed to reference 21 U.S.C. § 841(b). This claim is without merit. Defendant Villalobos pled guilty to an information, not the indictment, which charged a violation under 21 U.S.C. § 846 of conspiring to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), within 1000 feet of a public park. According to 21 U.S.C. § 846, "[a]ny person who . . . conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the . . . conspiracy." 21 U.S.C. § 846. The information specifically referred to 21 U.S.C. § 841(b)(1)(A)(viii). Defendant Villalobos's sentence was enhanced under Section 860(a), which provides:

> Any person who violates section 841(a)(1) of this title . . . by distributing . . . a controlled substance in or on, or within one

> thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school . . . is . . . subject to (1) twice the maximum punishment authorized by section 841(b) of this title….

21 U.S.C. § 860(a). Once his sentence was doubled under 21 U.S.C. § 860(a), defendant Villalobos was subject to a minimum mandatory sentence of twenty years, which the court imposed. Thus, Villalobos cannot establish that he was prejudiced by his attorney's failure to challenge the sufficiency of the indictment or the information. Therefore, this part of defendant Villalobos's motion is **denied.**

c. Constitutionality of 21 U.S.C. § 846

Defendant Villalobos also asserts that the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), rendered 21 U.S.C. § 846 facially unconstitutional.[1] He argues that because Congress intended drug quantity to be a sentencing factor determined by a judge and because § 841(a) prescribes no penalty absent a determination of drug quantity and type, then § 841 cannot constitutionally serve as the basis for a criminal conviction.

Review of this issue is precluded by the Eighth Circuit Court of Appeals's conclusion that the *Apprendi* decision presents a new rule of constitutional law that is not of "watershed" magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review. *Hines v. United States*, 282 F.3d 1002, 1004 (8th Cir.), *cert. denied*, 537 U.S. 900 (2002); *Sexton v. Kemna*, 278 F.3d 808, 814 n.5 (8th Cir. 2002), *cert. denied*, 537 U.S. 1150 (2003); *Murphy v. United States*, 268 F.3d 599, 600 (8th Cir. 2001), *cert. denied*, 534 U.S. 1169 (2002); *Jarrett v. United States*, 266 F.3d 789, 791 (8th

[1] A provision of a statute is facially unconstitutional if "no set of circumstances exists under which the [provision] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Cir. 2001), *cert. denied*, 535 U.S. 1007 (2002); *United States v. Dukes*, 255 F.3d 912. 913 (8th Cir. 8th Cir. 2001), *cert, denied*, 534 U.S. 1150 (2002); *United States v. Moss*, 252 F.3d 993, 995 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097 (2002). This view of the *Apprendi* decision has also been adopted by a clear majority of the other federal courts of appeals. *See, e.g., Sepulveda v. United States*, 330 F.3d 55 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77 (2d Cir.), *cert. denied*, 124 S. Ct. 840 (2003); *United States v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. United States*, 305 F.3d 378 (6th Cir.), *cert. denied*, 537 U.S. 1096 (2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002), *cert. denied*, 537 U.S. 1214 (2003); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir.), *cert. denied*, 537 U.S. 939 (2002); *United States v. Sanders*, 247 F.3d 139 (4th Cir.), *cert. denied*, 534 U.S. 1032 (2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002). Therefore, the court is unable to reach the merits of Villalobos's claim.[2]

C. Certificate Of Appealability

Defendant Villalobos must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability in this case. *See Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d

[2]Alternatively, even if the court were to reach the merits of Villalobos's claim, it is precluded by the Eighth Circuit Court of Appeals's decision in *United States v. Sprofera*, 299 F.3d 725 (8th Cir. 2002), in which the court concluded that: "we are persuaded by the reasoning of our sister circuits and conclude that 21 U.S.C. §§ 846 and 841 are not facially unconstitutional in light of *Apprendi*." *Id.* at 729.

749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U .S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El* that "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 123 S. Ct. at 1040 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court determines that Villalobos's petition does not present questions of substance for appellate review, and therefore, does not make the requisite showing to satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). With respect to Villalobos's claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

III. CONCLUSION

Defendant Villalobos's § 2255 motion is **denied**, and this matter is **dismissed in its entirety**. Moreover, the court determines that the petition does not present questions of substance for appellate review. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 30th day of September, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA